

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2776-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SHEBOYGAN FALLS MUTUAL INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

v.

MILWAUKEE MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
PETER J. NAZE, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Sheboygan Falls Mutual Insurance Company appeals a summary judgment that dismissed its claim for contribution against Milwaukee Mutual Insurance Company.¹ Sheboygan Falls provided homeowners

¹ This is an expedited appeal under RULE 809.17, STATS.

liability insurance to both Donald Sachsenmaier and the personal representative of his estate on his death. After Donald's death, Robert Sachsenmaier became personal representative of his estate, the property of which included Donald's dog. During the pendency of the estate, the dog bit Kathleen O'Meara, who sued Robert as personal representative and dog "owner" under § 174.02, STATS. This statute imposes strict liability for dog bites on dog owners.

Sheboygan Falls supplied Robert a defense and then sought to compel Milwaukee Mutual to contribute to the defense as Robert's homeowners liability insurer. Milwaukee Mutual refused, and the trial court upheld its refusal on the ground that Robert, as personal representative, was not liable for the dog bite. Sheboygan Falls argues that personal representatives are liable for their torts during the estate's administration. Among other authorities, it cites the decision in *McAdams v. Starr*, 49 A. 897 (Conn. 1901), which held an estate administrator liable for injuries caused by a dog that was part of the estate under administration. We reject Sheboygan Falls' arguments and therefore affirm the summary judgment.

The trial court correctly granted summary judgment if there was no dispute of material fact and Milwaukee Mutual deserved judgment as a matter of law. See *Powalka v. State Life Mut. Assur. Co.*, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). Here, we reject Sheboygan Falls' argument for two reasons. First, Sheboygan Falls seeks to hold the personal representative liable as the dog's

owner in strict liability, not for the personal representative's personal negligence. The probate code leaves personal representatives something less than a true "owner" of the property of the estate. They no longer have title *per se*; since the 1985 legislative revisions, they only "succeed to the interest of the decedent." *See* § 857.01, STATS. We do not believe that this qualifies them as "owners" *per se* under the dog bite statute.

Second, even if personal representatives did qualify as owners, they still have no liability. The RESTATEMENT (SECOND) OF TRUSTS provides that receivers in equity and trustees in bankruptcy have no tort liability as holders of property unless personally at fault. *See* 2 RESTATEMENT § 264, comment a, at 9 (1959). Personal representatives are the same kind of short-term, court-appointed, quasi-involuntary fiduciaries, and we conclude that they thereby have the same shield from tort liability as equity receivers and bankruptcy trustees, in the absence of a showing of personal fault. Here, the record contains no evidence of personal fault by Robert. As a result, Robert was not liable, and Milwaukee Mutual had no duty to defend or indemnify him. To the extent the Connecticut Supreme Court's *Starr* decision holds otherwise, it is nonbinding, and we reject its analysis.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

